# John Lo Thau Fah v FACB Resorts Berhad

HIGH COURT (KOTA KINABALU) — SUIT NO K22–27 OF 2003
HAMID SULTAN JC
21 MAY 2007

*Civil Procedure — Summary judgment — Triable issues — Appointment as executive deputy chairman — Offer letter offering additional extraordinary package — Most terms conditional of certain events — Board's approval not obtained — Further judicial scrutiny needed*

*Contract — Employment contract — Breach — Offer letter offering additional extraordinary package — Most terms conditional of certain events — Whether implied term that the letter subject to or conditional upon the board's approval or ratification*

The plaintiff claimed that a letter dated 22 November 1999 was an agreement between the defendant and the plaintiff that in consideration of the plaintiff's acceptance to join Karambunai Resorts Sdn Bhd ('KRSB'), a wholly owned subsidiary of the defendant as its executive deputy chairman and their mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah: (i) the defendant shall offer to the plaintiff one million shares in KRSB at the total consideration of RM1. The said KRSB shares shall be made available to the plaintiff within 30 days from the date of submission of an initial public offer ('IPO') exercise by DBS Merchant Bank of Singapore to the stock exchange of Singapore; (ii) if the IPO exercise is either not successful or not implemented for whatsoever reason before the end of the year 2000, the defendant shall pay to the plaintiff the sum of Singapore dollars S$1,000,000 in cash, in lieu of the offer of the said KRSB shares. The said IPO exercise was not successful and/or was not implemented before the end of the year 2000. The defendant did not deny its president/chief executive officer ('defendant's CEO') signed the said letter. The defendant alleged that the letter was signed based on the representations of the plaintiff to the defendant's CEO and there was a total failure of consideration on the part of the plaintiff in fulfilling his representations and undertakings. Further the defendant claimed that (i) the plaintiff and the defendant were under a common mistake of fact that the defendant board's approval was not required for the additional extraordinary package in the letter whereas in fact it was; (ii) it was an implied term that the said letter would be subject to or conditional upon the board's approval or ratification. The defendant's board did not approve or ratify the said letter. Summary judgment for the plaintiff was granted by the learned deputy registrar and the defendant appealed.

**Held**, allowing defendant's appeal with costs:

(1) It appeared that the letter did not reflect the force, dignity, and aura which are

often associated with good corporate governance. The contents of the letter did not disclose fixed terms and conditions. All or most of the terms were conditional of certain events that may or may not happen. The payment of Singapore one million dollars was termed in a manner which relates to wagering contracts and needs further judicial scrutiny. The lump sum payment for breach offended the rule relating to penalty clause (see para 8).

(2) Without a trial it would not be legally correct to say that there is an agreement which is enforceable at law. An agreement under the Contracts Act 1950 (the Act) does not become a contract, for the Act defines contract as an agreement enforceable by law. For an agreement to be enforceable in law, it must satisfy the requirement set out in s 10 and any other provisions of the Act or law in force. Thus, it can be said that all contracts are agreements but all agreements are not contracts. If the agreement is in breach of the section, it is illegal and in consequence it is void ab initio. The said letter prima facie appears to offend s 10 and in consequence needs further judicial scrutiny (see para 8(a)).

(3) Before the plaintiff could succeed in an application for summary judgment it was necessary for the plaintiff first to demonstrate that there was a prima facie case for summary judgment. Once that threshold was satisfied only then must the court look into the defence and affidavit to see whether the defendant had raised triable issue or issues. If the plaintiff's claim disclosed acts which were in breach or likely to be in breach of statutory provisions or tainted with illegality or against public policy, an application for summary judgment and even a default judgment would not be in order notwithstanding the defendant admitted the claim. This was so to ensure that the courts were not used as a vehicle by litigants to affirm and give effect to dubious, illegal and/or transactions and dealings which were against public policy. The court was not bound to entertain an application for summary judgment if it takes the view that there ought to be, for some other reasons, a trial of that claim or part (see para 10).

**[Bahasa Malaysia summary**

Plaintif menyatakan bahawa satu surat bertarikh 22 November 1999 adalah satu perjanjian di antara defendan dan plaintif dimana sebagai balasan plaintif menerima tawaran untuk menyertai Karambunai Resorts Sdn Bhd ('KRSB'), sebuah syarikat yang dimiliki sepenuhnya oleh defendan sebagai penolong pengerusi eksekutifnya dan persefahaman bersama mereka serta akujanji mereka untuk bekerjasama di antara satu sama lain untuk membangunkan pelancongan di Sabah: (i) defendan akan menawarkan kepada plaintif satu juta saham di KRSB sebagai balasan berjumlah RM1. Saham KRSB tersebut akan disediakan kepada plaintif dalam masa 30 hari daripada tarikh satu initial public offer ('IPO') diserahkan yang dijalankan oleh DBS Merchant Bank Singapura dengan bursa saham Singapura; (ii) sekiranya IPO tersebut tidak berjaya atau tidak dilaksanakan untuk apa juga alasan sebelum akhir tahun 2000, defendan akan membayar plaintif jumlah Singapura dollar S$1,000,000 secara tunai, sebagai ganti tawaran saham KRSB tersebut. IPO yang dijalankan tersebut tidak berjaya dan/atau tidak dilaksanakan sebelum akhir tahun 2000.

A Defendan tidak menafikan bahawa presiden/ ketua pegawai eksekutif ('CEO defendan') menandatangani surat tersebut. Defendan menyatakan bahawa surat tersebut ditandatangani berdasarkan representasi-representasi plaintif kepada CEO defendan dan terdapat kegagalan balasan di pihak plaintif dalam menunaikan representasi-representasinya dan akujanji-akujanjinya. Lanjutan dari itu, defendan
B menyatakan bahawa (i) plaintif dan defendan di bawah satu kesilapan bersama fakta bahawa kebenaran lembaga tidak diperlukan untuk pakej tambahan yang luar biasa di dalam surat tersebut manakala pada hakikatnya ia diperlukan; (ii) ia merupakan terma tersirat bahawa surat tersebut adalah bertakluk atau bersyarat berdasarkan kebenaran lembaga ataupun diratifikasikan. Lembaga defendan tidak membenarkan atau meratifikasikan surat tersebut. Penghakiman terus untuk plaintif diberikan oleh
C timbalan pendaftar yang bijaksana dan defendan merayu.

**Diputuskan**, membenarkan rayuan defendan dengan kos:

D (1) Surat tersebut kelihatan seperti tidak mencerminkan kuasa, maruah, dan aura yang seringkali dikaitkan dengan sistem urusan perniagaan yang baik. Kandungan surat tersebut tidak mengemukakan terma-terma dan syarat-syarat yang tetap. Kebanyakan atau kesemua terma-terma adalah tertakluk kepada sesuatu kejadian yang mungkin atau tidak mungkin berlaku. Bayaran satu juta dollar Singapura telah dinyatakan dalam cara yang berkait dengan kontrak
E taruhan dan memerlukan pemeriksaan kehakiman yang lebih lanjut. Bayaran sekaligus untuk kemungkiran melanggar kaedah yang berhubung dengan fasal penalti (lihat perenggan 8).

(2) Tanpa satu perbicaraan ia tidak dapat dikatakan adalah betul dari segi
F undang-undang bahawa terdapat satu perjanjian yang dapat dikuatkuasakan mengikut undang-undang. Satu perjanjian di bawah Akta Kontrak 1950 (Akta tersebut) tidak menjadikannya satu kontrak, oleh kerana Akta tersebut menaksirkan kontrak sebagai satu perjanjian yang dikuatkuasakan oleh undang-undang. Untuk satu perjanjian dikuatkuasakan mengikut undang-undang, ia harus memuaskan keperluan seperti yang dinyatakan
G di s 10 dan peruntukan-peruntukan yang lain di Akta tersebut atau di undang-undang yang berkuatkuasa. Dengan itu, ia dapat dikatakan bahawa semua kontrak-kontrak adalah perjanjian-perjanjian tetapi bukan semua perjanjian-perjanjian adalah kontrak. Sekiranya perjanjian tersebut melanggar seksyen tersebut, ia adalah menyalahi undang-undang dan akibatnya tidak sah
H ab initio. Surat tersebut prima facie kelihatan seperti melanggar s 10 dan dengan itu memerlukan pemeriksaan kehakiman yang lebih lanjut (lihat perenggan 8(a)).

(3) Sebelum plaintif dapat berjaya dalam satu permohonan untuk penghakiman terus, ia adalah perlu untuk plaintif pertamanya menunjukkan bahawa
I terdapat satu kes prima facie untuk penghakiman terus. Hanya setelah ambang ini dicapai mahkamah akan meneliti pembelaan dan affidavit untuk menentukan sama ada defendan telah membangkitkan satu isu yang patut dibicarakan. Sekiranya, tuntutan plaintif mengemukakan tindakan-tindakan yang melanggar atau berkemungkinan akan melanggar peruntukan-peruntukan statutori ataupun dicemari dengan kepenyalahan

undang-undang ataupun berlawanan dengan polisi awam, satu permohonan untuk penghakiman terus dan juga satu penghakiman ingkar tidak akan teratur walaupun defendan mengakui tuntutan tersebut. Ini adalah begitu untuk mempastikan bahawa mahkamah-mahkamah tidak digunakan sebagai satu kenderaan oleh litigan-litigan untuk mengesahkan dan memberi kesan kepada urusan dan transaksi yang disangsikan, salah dari segi undang-undang dan/atau berlawanan dengan polisi awam. Mahkamah tidak terikat untuk melayan permohonan untuk penghakiman terus sekiranya ia berpendapat bahawa sepatutnya, atau atas sebab-sebab yang lain, satu perbicaraan tuntutan atau sebahagian tuntutan tersebut (lihat perenggan 10).]

**Notes**

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3243

For cases on breach of employment contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3048–3052.

**Cases referred to**

*Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 (refd)
*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (refd)
*Bahi Panna Singh v Bhai Arjun Singh* AIR 1929 (PC) 179 (refd)
*Blay v Pollard & Morris* [1930] 1 KB 628 (refd)
*Carlil v Carbolic Smoke Ball Co* [1892] 2 QB 484 (refd)
*Concentrate Engineering Pte Ltd v UMBC Bhd* [1990] 3 MLJ 1 (refd)
*DCB Bank Berhad v NS Bahtera Sdn Bhd & 2 Ors* [1999] 2 AMR 1790 (refd)
*Daiman Development Sdn Bhd v Mathew Lui Chin Teck and Anor* [1980] 1 MLJ 56 (refd)
*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (refd)
*Earl Ellesmere v Wallace* [1929] 2 Ch 1 (refd)
*Hill v William Hill (Park Lane) Ltd* [1949] AC 530 (refd)
*Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 330 (refd)
*Jobson v Johnson* [1989] 1 All ER 621 (refd)
*Law v Redditch Local Board* [1892] 1 QB 127 (refd)
*Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 (refd)
*Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 AMR 631 (refd)
*Phonographic Equipment* (1958) Ltd v Muslu [1961] 3 All ER 626 (refd)
*Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461 (refd)
*Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 (refd)
*State Government of Perak v Muniandy* [1986] 1 MLJ 490 (refd)
*State Of Kerala v M/s United Shippers and Dredges Ltd* AIR 1982 Kerala 281 (refd)
*UMBC v Palm Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (refd)
*Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 (refd)
*Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81 (refd)

**Legislation referred to**

Civil Law Act 1956 s 26
Contracts Act 1950 ss 2(h), 10, 24, 30, 31, 33-37, 75
Rules of the High Court 1980 O 14

Specific Relief Act 1950 s 20

*Mau Kam Peng (Mau & Kadir) for the plaintiff/respondent.*
*Marina Tiu (Yap Chin & Tiu) for the defendant/appellant.*

**Hamid Sultan JC:**

**[1]** This is my judgment in respect of the defendant's appeal (encl 66) against the summary judgment for the plaintiff granted by the learned deputy registrar on 14 November 2003 pursuant to O 14 of the Rules of the High Court 1980 ('RHC'). The plaintiff's claim is substantially grounded on a letter dated 22 November 1999 which the plaintiff says is an agreement the terms of which are enforceable at law. The defendant disputes it on cogent grounds.

**[2]** The plaintiff's action as pleaded can be summarised as follows:

(a) by the said letter, it was agreed between the defendant and the plaintiff that in consideration of the plaintiff's acceptance to join KRSB as its executive deputy chairman and their mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah: (i) the defendant shall offer to the plaintiff one million shares in KRSB at the total consideration of RM1. The said KRSB shares shall be made available to the plaintiff within 30 days from the date of submission of an initial public offer ('IPO') exercise by DBS Merchant Bank of Singapore to the stock exchange of Singapore. (ii) if the IPO exercise is either not successful or not implemented for whatsoever reason before the end of the year 2000, the defendant shall pay to the plaintiff the sum of Singapore dollars S$1,000,000 in cash, in lieu of the offer of the said KRSB shares.

Particulars of the Letter

The said letter was issued by the defendant to the plaintiff, and was dated 22 November 1999, bearing the reference CEO/cy/PPSB/001/11.99, and signed by Tan Sri Dr Chen Lip Keong as the president/chief executive officer of and for the defendant. It was also signed and accepted by the plaintiff.

(b) the plaintiff accepted and performed his part of the said agreement. The said IPO exercise was not successful and/or was not implemented before the end of the year 2000. The defendant failed to offer to the plaintiff the said one million shares in KRSB at the total consideration of RM1 in accordance with the said agreement. The said sum of Singapore dollars S$1,000,000 became due and payable by the defendant to the plaintiff on 1 January 2001. Notwithstanding the demand for payment by the plaintiff, the defendant has neglected and failed to pay to the plaintiff the said sum of Singapore dollars S$1,000,000 or any part thereof. The plaintiff claims against the defendant the sum of RM2,223,000 being the ringgit Malaysia equivalent of the sum of Singapore dollars S$1,000,000 and/or alternative damages, with interests and costs.

**[3]** The defendant's defence as put forward can be summarised as follows: A

(a) the defendant does not deny its president/chief executive officer ('defendant's CEO') signing the said letter. However, the defendant says that the said letter was signed based on the representations of the plaintiff to the defendant's CEO that: (i) he should be able to convince the government of Sabah or the relevant authorities to grant the necessary approvals to make the vision of Borneo Resort Karambunai (comprising but not limited to the living museum of Borneo, cultural village, water park, animal park, including the Orang Utan sanctuary) a reality and spearhead its planning, financing and development; (ii) he shall persuade the existing tourism school in Kota Kinabalu to enter into a joint venture with Karambunai Resorts Sdn Bhd (hereinafter referred to as 'KRSB') to set up a tourism college for KRSB for which there is already an existing market and clientele in the form of current or future employees of all the various private or governmental tourism related companies or bodies, all of whom he shall woo to enroll their people in the tourism college; (iii) he would secure new flights into Sabah from other airlines and acquire additional and cheaper flights into Sabah from existing airlines; (iv) he shall attract overseas investments into Karambunai to build and develop more tourist attractions and destinations; (v) he shall set up a travel agency for KRSB and also secure canvass tourist arrivals to Karambunai; (vi) he shall be able to obtain on behalf of KRSB the necessary approvals for the property development known as Bukit Sierra at Mile 13, Jalan Tuaran, Kota Kinabalu and to set in motion the property development; (vii) he would devote all his time and energy to KRSB as he has absolutely no other interests whether direct or indirect in any whatsoever tourism related companies or ventures; and (viii) he would provide the leadership required to achieve all the above objectives and make Karambunai a major tourist destination on par with international destinations such as Bali, Phuket, Hawaii and Cancun. Relying on the representations of the plaintiff and not otherwise, the defendant's CEO agreed to sign the said letter. In breach of the plaintiff's aforesaid representations: (i) the plaintiff failed to accomplish all or any of the representations above mentioned; and (ii) he had, at all material times, a direct and indirect interest in a travel agency known as Carlota's Borneo Holidays Sdn Bhd. B C D E F G

(b) by reason of the matters aforesaid, the defendant alleges that the said letter is rendered unenforceable, null and void. Further, or in the alternative, the defendant claims that (i) the plaintiff and the defendant were under a common mistake of fact that the defendant's board's approval was not required for the additional extraordinary package as set out in the said letter whereas in fact it was; (ii) it was an implied term that the said letter would be subject to or conditional upon the board's approval or ratification. The defendant's board did not approve or ratify the said letter. Moreover, the defendant contends that there was a total failure of consideration on the part of the plaintiff in fulfilling his representations and undertakings. The defendant further disputes that the said letter is unenforceable as the plaintiff had, prior to the execution of the said letter, already agreed to join KRSB as its executive deputy chairman. In the light of the foregoing, the purported consideration of the plaintiff was past consideration and not enforceable. (i) in addition, the said letter is to be read together with the terms and conditions of a letter dated 9 November 1999 H I

whereby the plaintiff had agreed to join KRSB (a wholly owned subsidiary of the defendant) as its executive deputy chairman on terms, inter alia, as follows: Salary: RM20,000 per month. Bonus: Non-contractual/discretionary. Company Car: A fully maintained car, a model to be mutually agreed upon. Driver: A company driver will be provided for. Handphone: All business calls to be reimbursed monthly, based on actual amount incurred. Entertainment: entertainment allowance not to exceed RM3,000 per month, to be reimbursed on a monthly basis based on actual amount incurred. Golf Club: He and his spouse will be entitled to the rights of golf membership at Karambunai Resorts Golf Course during the term of employment with KRSB. The defendant says that further and/or in the alternative, the said letter is void for uncertainty in that the words 'our mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah' are uncertain. Besides, there is no time frame specified for the payment of one million Singapore dollars ('SGD1m'). There was no specific cut-off time designated for the payment of SGD1m because the parties were uncertain as to when the plaintiff could in fact achieve all that he had represented. In any event, the contract is unenforceable and contrary to public policy.

**[4]** The plaintiff's reply to the defence can be summarised as follows:

(a) the defendant's allegations are not maintainable by reason of the following matters:

(i) in November 2002, the defendant accepted the plaintiff's resignation and thanked the plaintiff for the plaintiff's 'great contribution' towards the defendant's group. By a letter dated 19 November 2002 to the plaintiff signed by Tengku Datuk Dr Zainal Adlin bin Tengku Mahamood, the defendant's chairman and director, and KRSB's chairman and director, it was, inter alia, stated that:

On behalf of the Board of Directors of the Group, we thank you for your great contribution towards the Group …

(ii) after the plaintiff had resigned, the defendant has reaffirmed the defendant's debt and liability in the 'amount due to you [the plaintiff] as per FACB Resorts Berhad letter dated 22 November 1999 (reference: CEO/cy/PPSB/001/11.99). Mr Eric Tay (also known as Mr Tay Guan Kee), a chartered accountant, and the defendant's chief financial officer/chief operating officer, and a director of the defendant, signed the said letter dated 31 December 2002.

(iii) when the contract was made and at all material times, the plaintiff was an outsider vis-à-vis the defendant. The plaintiff was entitled to believe and assume, as he did, that Tan Sri Dr Chen Lip Keong, the president/chief executive officer and director of the defendant, had been and was duly authorised to make the contract for the defendant and that all matters of internal management and procedure of the defendant had been or would be complied with.

(iv) the contract (dated 22 November 1999) was stated therein to and intended to supersede the earlier agreement between the parties contained in the

defendant's letter to the plaintiff dated 15 November 1999, offering substantially identical terms to the plaintiff. The plaintiff and the defendant had agreed that the said earlier agreement was to be supplemented and accordingly replaced by the contract contained in the plaintiff's letter dated 22 November 1999.

(v) the plaintiff agreed to join KRSB, a subsidiary of the defendant, as its executive deputy chairman of KRSB at the request of the defendant and Tan Sri Dr Chen Lip Keong, the defendant's president/chief executive officer and a director of the defendant.

(vi) the plaintiff joined KRSB and was appointed its executive deputy chairman at a date after 22 November 1999, after the contract had been entered into between the plaintiff and the defendant.

(vii) it is an express written term of the contract contained in the letter dated 22 November 1999 bearing reference CEP/cy/PPSB/001/11.99 at paragraph 2.3 thereof that:

> In the event that the IPO exercise of KRSB is not successful or implemented for whatsoever reason before end 2000, FACB Resorts Berhad [the defendant] shall pay you [the plaintiff] SGD1m (Singapore Dollars One Million only) in cash, in lieu of offer of the said KRSB shares'.

(viii) the IPO exercise of KRSB was not successful and/or was not implemented before the end the year 2000. On the express written term of the contract, the said sum became due and payable immediately after the end of the year 2000, namely on 1 January 2001, without demand or application on the part of the plaintiff.

(ix) the defendant's allegations are not maintainable. The defendant has no defence to the plaintiff's claim. There is no triable issue herein.

**[5]** The defendant has filed various affidavits opposing the summary application. I have gone through them in detail inclusive of the plaintiff's affidavit and I find that some of the issues raised are not clearly pleaded and run foul of the rules of pleading. I do not wish to deal with those issues in detail except to state the law as follows:

(a) Pleadings are statements in writing, drawn up and filed by each party to an action stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer. It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts, which they had not pleaded (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v Pollard & Morris* [1930] 1 KB 628, Scrutton L J observed:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

(b) After having read the affidavits filed herein I am satisfied that various facts are raised which are not in the pleadings. In *UMBC v Palm Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206, the Federal Court had asserted that defects or

omissions in a statement of claim cannot be remedied or corrected by an affidavit in support of the application. The statement of claim must be amended in the normal way;

(c) The principles in respect of summary judgment are almost well settled. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 Mohamed Azmi SCJ (as His Lordship then was) observed:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand [see *Cow v Casey* and *European Asian Bank AG v Punjab & Sind Bank* at p 516].

Gunn Chitt Tuan SCJ (as His Lordship then was (dissenting)) observed:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980.

Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery Co* that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given [*Manger v Cash*].

The words used in the present O 14 r 3(1) that the defendant should have leave to defend if he satisfies the court 'that there ought for some other reason to be a trial' of the claim are wider in their scope than the former O 14 r 1 which provided that the defendant should have leave to defend if he 'shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally'. It was stated by Megarry J in *Miles v Bull* that it sometimes happens that the defendant may not be able to pinpoint any precise 'issue or question in dispute which ought to be tried', nevertheless, it is apparent that for some other reason there ought to be a trial, e.g. where a question of fact as to whether the plaintiff has fulfilled his part of the contract (*Ford v Harvey*) or against a surety where there is a reasonable doubt of his liability [*Lloyds Banking Co v Ogle*].

Moreover, when an O 14 appeal has been heard by a lower court, the appellate court would not interfere with the decision unless special circumstances are shown (see *United Malayan Banking Corp Ltd v Ipoh Mining Co (M) Ltd*). In that case, the former Federal Court followed its decision in *Ho Chooi Soon v The Indian Overseas Bank Ltd* and the old English case of *Wing v Thurlow*. In the present case, I was unable to detect any special circumstances and I was of the view that Lim Beng Choon J was right in holding that the issues referred to above ought to be tried and that the appellants were not entitled to obtain summary judgment under O 14.

Further, reference might be made to the decision of this court in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd*, where in a judgment delivered by Lee Hun Hoe CJ (Borneo; As he then was), it was held, inter alia, that summary jurisdiction conferred by O 81, which provides a procedure similar to O 14, must be used with great care. In that case, the defence had alleged not only variation but also estoppel and in view of that it could not be said that liability for breach of contract had been clearly established and that unconditional leave to defend should be given.

This was not an uncontested case and in my view it was not uncontestable. The respondents have reasonable grounds for setting up a bona fide defence although it might be argued that the defence is not likely to succeed. However, the respondents should not be shut out from laying their defence and there are reasons why there ought to be a trial. In all the circumstances of this case, I would therefore dismiss the appeal with costs.

(d) In *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 AMR 631, Justice Gopal Sri Ram JCA observed:

I am conscious of the more robust approach to applications for summary judgment that has been adopted by our courts more recently. But I think that in the process the cautionary words of Thompson CJ in *Syn Lee* to which emphasis has been supplied may have been overlooked.

It is my respectful view that the passage in the opinion of Lord Diplock in *Eng Mee Yong* (supra) that was quoted by Macdonald J in *Bank of British Columbia* (supra) and relied upon by the majority in *Bank Negara* (supra) is entirely irrelevant to an application for summary judgment. Although the majority decision of the Supreme Court may plainly bind us, I cannot escape the feeling that the minority judgment of Gunn Chit Tuan SCJ (later Chief Justice of Malaya) and the approach taken by him truly represents the law. It is neither open to me nor is it my place to say anything more about the rather novel decision in Bank Negara, but the time may come when the approach there adopted by the minority may have to be reconsidered by the Federal Court in an appropriate case.

(e) It must be emphasised that the court has a wide discretion not to allow the plaintiff to enter summary judgment if the court for some other reason takes the view that there ought to be a trial of the whole or part of the claim. This is specifically spelled out in RHC O 14 r 3(1). This part of the rule was considered in *Concentrate Engineering Pte Ltd v UMBC Bhd* [1990] 3 MLJ 1. In that case the plaintiff, a customer of the defendant, claimed that the defendant wrongly paid out on the cheques, which were purported to be issued by the plaintiff. On the facts it became evident that the cheques were duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendant. However, the signatures on the cheques were declared by expert evidence to have been traced from genuine signatures. The court held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiff constitute 'some other reason' for a trial in terms of O 14 r 3(1). Further, the court stated that the circumstances disclosed called for further investigation.

**[6]** I have considered the submission of both parties in detail and if I have to decide this appeal in the defendant's favour I must be satisfied that there are issue or issues which need to be tried and/or some other reason for trial.

**[7]** The plaintiff's claim for a million Singapore dollars with interest for breach of the terms of the said letter or damages in lieu is grounded on the said letter. A copy of the said letter is reproduced and it reads as follows:

FACB

FACB Resorts Berhad (Company No. 6461-P)

(Formerly known as FACB Berhad)

Level 19, Menara PanGlobal, 8 Lorong P Ramlee,

50250 Kuala Lumpur, Malaysia.

P.O. Box 11718, 50754 Kuala Lumpur, Malaysia.

Tel (603) 201 2377 Fax (603) 201 5275

Our Ref: CEO/cy/PPSB/001/11.99

Date: 22 November 1999

STRICTLY CONFIDENTIAL

Mr John Lo

PERLIS PLANTATION SDN BHD

Bangunan BFO, 2nd Floor

88999 Kota Kinabalu

Sabah.

BY HAND

Dear Mr. Lo,

JUNIOR-SENIOR PARTNERSHIP INCENTIVES

(1) In consideration of your acceptance to join Karambunai Resorts Sdn Bhd (hereinafter referred to as KRSB) as Executive Deputy Chairman and our mutual understanding and undertaking to cooperate with each other in order to develop tourism in Sabah. I would like to offer the following incentives as described her0ein(sic) for your kind acceptance.

(2) I have raised the issue of an IPO exercise of KRSB on the Singapore Stock Exchange and also would like to take this opportunity to make an offer of 1 (one) million KRSB shares (hereinafter referred to as the 'said KRSB shares') subject to the following terms and conditions.

2.1. The said KRSB shares shall be offered by FACB Resorts Berhad for RM 1 consideration, the receipt is hereby acknowledged.

2.2. The said KRSB shares shall be made available to you within 30 days from the date of submission of an IPO exercise by DBS Merchant Bank of Singapore to the Stock Exchange of Singapore.

2.3. In the event that the IPO exercise of KRSB is not successful or implemented for whatsoever reasons before end 2000, FACB Resorts Berhad shall pay you SGD 1 million (Singapore Dollars One Million Only) in cash, in lieu of offer of the said KRSB shares.

2.4. KRSB and/or FACB Resorts Berhad shall bear all tax charges, if any, resulting from the transfer of the said KRSB shares in favour of you and/or the payment of cash SGD 1 million to you.

2.5. This letter supersedes the letter dated 15 November 1999.

SINCERELY

Sgd

TAN SRI DR CHEN LIP KEONG

President/Chief Executive Officer

Accepted by:

Sgd

JOHN LO

IC No: 450513–12–5369

**[8]** At first sight of the letter, it appeared to me that the letter does not reflect the force, dignity, and aura which are often associated with good corporate governance. The contents of the letter did not disclose fixed terms and conditions. All or most of the terms were conditional of certain events that may or may not happen. The payment of Singapore one million dollars is termed in a manner which relates to wagering contracts and needs further judicial scrutiny. The lump sum payment for breach offends the rule relating to penalty clause. The grounds for my reasons are as follows:

(a) The plaintiff relying on the letter says there is an agreement on the facts of this case. Without a trial I do not think it will be legally correct to say that there is an agreement which is enforceable at law. An agreement under the Contracts Act 1950 (CA 1950) does not become a contract, for CA 1950 defines contract as an agreement enforceable by law [see CA 1950 s 2(h)]. The definitions consist of two parts, namely an agreement and legal obligation. The nature of the agreement and legal obligation are further defined in s 2. For an agreement to be enforceable in law, it must satisfy the requirement set out in s 10 and any other provisions of the CA 1950 or law in force. Thus, it can be said that all contracts are agreements but all agreements are not contracts. Under s 10, for the contract to be valid it must be made by free consent of the parties competent to contract, for a lawful consideration and with a lawful object. The law of contracts may be subject to other provisions of the law.

What considerations and objects are lawful and what is not are set out in s 24 of the CA 1950. If the agreement is in breach of the section, it is illegal and in consequence it is void ab initio. The said letter prima facie appears to offend s 10 and in consequence needs further judicial scrutiny.

(b) The terms of the purported agreement in this instance, inter alia, appears to be conditional in nature. Conditional contract may or may not be enforceable. The law on this area is almost settled, and that is to say conditional contract may be enforceable upon the terms of the contract being satisfied. In D*aiman Development Sdn Bhd v Mathew Lui Chin Teck and Anor* [1980] 1 MLJ 56, the Privy Council observed:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstance in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangement might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words.

(c) Some of the purported terms of the agreement also appear to be contingent in nature. The law on contingent contracts is captured in s 31 of CA 1950. The performance of such contract is dependent on the happening or non happening of certain event, or collateral event to the contract. Collateral event here means that the event is neither a performance directly promised as part of the contract, nor the consideration for the promise. The principle relevant for enforcement of contingent contract is set out in ss 33 to 37 of the CA 1950. It is trite that such a contract cannot be enforced in law unless the event stated in the contract has happened. Contingent contract which amount to wager is void in law. An agreement will amount to wager if the parties to the agreement are not interested in the happening of the collateral event except for the purpose of wining or losing as per the terms of the agreement or bet. Section 26 of the Civil Law Act 1956 recognises certain types of agreement which may amount to wager. At common law, a wagering contract is one by which two persons professing to hold opposite views concerning the occurrence or outcome of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that the other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties [see *Carlil*

*v Carbolic Smoke Ball Co* [1892] 2 QB 484; *Earl Ellesmere v Wallace* [1929] 2 Ch 1 CA]. This definition excludes the prize awarded for any lawful game, sport, pastime or exercise. Any other such wagering contract is void and no action may be brought upon it [see *Hill v William Hill (Park Lane) Ltd* [1949] AC 530]. Under the CA 1950 the definition of 'wager' will appear to be wider then at common law.

(d) The default provision to pay the sum of 1 million Singapore dollars will appear to be a penalty clause. Section 75 of CA 1950 makes provision for payment of agreed sum as damages provided it is reasonable. Where the breach is a failure to pay money, or where the parties have agreed beforehand on a sum to be payable as damages in the event of a breach, the claim will be for a liquidated sum. Liquidated damages must be distinguished from a penalty. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine contractual pre-estimate of damage [see *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at p 86, HL]. The distinction between penalties and liquidated damages depends on the intention of the parties to be inferred from the whole contract [see *Jobson v Johnson* [1989] 1 All ER 621]. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages (see *Law v Redditch Local Board* [1892] 1 QB 127). A plaintiff may ignore the penalty clause and sue for damages; (see *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66) where he relies on it, the onus of proving that it is a penalty clause lies upon the defendant (see *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at p 142). The court will not interfere with a sum which has been genuinely agreed as liquidated damages (see *Phonographic Equipment (1958) Ltd v Muslu* [1961] 3 All ER 626).

In *Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 330, Haidar J (as His Lordship then was) observed:

> The distinction between liquidated damages and penalty has ceased to be of great legal importance as the result in either case is that the court must determine reasonable compensation. Had the plaintiff placed the sum of $72,000 of fixed deposit instead of paying the defendant, the interest which would accrue would have been more than the sum of $6,000 liquidated damages agreed upon. As such, this agreed sum was reasonable compensation.

In the Privy Council decision of *Bahi Panna Singh v Bhai Arjun Singh* AIR 1929 (PC) 179, it was stated that the effect of this provision is to disentitle the plaintiffs to recover the sum stated in the contract whether it may be construed as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. Under this section only reasonable compensation will be entertained by the courts (see *State of Kerala v M/s United Shippers and Dredges Ltd* AIR 1982 Kerala 281).

In *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, Lord Hailsham LC observed:

> The reason in substance was that, though it is true that s 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered, these technical rules had developed entirely separately from the law relating to deposits and for a very long time no one thought that the section in the Contract Act which superseded them had any application to the deposit cases, or, at least, wherever the point was argued, it was rejected by the Indian courts.

In *Linggi Plantations Ltd v Jagatheesan*, inter alia, the issue was whether the deposit can be forfeited. The Privy Council made the following observations:

> (a) Once it was decided that the construction of the contract was such that the sum of $377,500 was paid as a true deposit and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, s 75 of the Ordinance could have no application when the contract was properly terminated, and the deposit was forfeited whether or not damage was proved. (b) There was no difference in this context between the expression 'deposit' and the expression 'earnest money'. (c) A reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and forfeiture has never been regarded as a penalty in English law or common English usage.

In *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, the Federal Court considered 'default interest' in the context of s 75 of the CA 1950 and opined that:

> (a) Pursuant to s 75 of the Contracts Act, if a sum is named in a contract as the amount to be paid in case of breach of such contract, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for.

Following the above principles I take the view that if the plaintiff's claim for a million Singapore dollars is not a genuine contractual pre-estimate of damage then it cannot be a basis for summary judgment, and the plaintiff may have to rely on the alternative claim for damages for which full trial need to be held.

(e) Further, the purported agreement will appear to have a number of uncertain terms. Section 30 of CA 1950 affirms that where the meaning of the agreement is not certain, it is void. This section must be read with s 20(1)(c) of the Specific Relief Act 1950 (SRA 1950) which states that a contract cannot be specifically enforced if it contains terms which the court cannot find with reasonable certainty. In *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81, the Court of Appeal without mentioning s 20 SRA 1950 considered whether an option clause was void for uncertainty and made the following observations:

> (a) An option clause is void for uncertainty unless the agreement provided the machinery or some formula which the courts can utilize to ascertain what is otherwise unascertainable without the parties coming to an agreement. (b) The courts will not lend their aid to the enforcement of an incomplete agreement.

**[9]** The said letter will not satisfy the requirements of s 30 of the CA 1950 and in consequence, basing on the same letter alone, the plaintiff cannot succeed in his claim for summary judgment when the defendant is resisting the claim on various grounds. Further, the letter cannot ordinarily be said to have very little financial consequence. More often than not if the parties have intended to rely on the said letter it would have been stamped and proper sanction from various parties inclusive of the share holders and/or board of directors with proper resolution would have been obtained. All this seems to be absent and this per se does not reflect good corporate governance as the parties to this transaction appear to impress by their affidavits that they are corporate personalities. The purported agreement also shows the shoddiness of transaction unless it can be clearly ventilated and established by full trial. This letter also appears to reflect sham transactions which may not get the support of the members of the defendant more so when it is a public listed company.

**[10]** It is often said that to defeat an application for summary judgment the defendant must raise triable issues, failing which judgment must be entered against the defendant. I think that is not quiet correct. I am of the view that before the plaintiff can succeed in an application for summary judgment it is necessary for the plaintiff first to demonstrate that there is a prima facie case for summary judgment (see *DCB Bank Berhad v NS Bahtera Sdn Bhd & 2 Ors* [1999] 2 AMR 1790). Once that threshold is satisfied only then must the court look into the defence and affidavit to see whether the defendant has raised triable issue or issues. My view is not without reason, for example if the plaintiff's claim discloses acts which are in breach or likely to be in breach of statutory provisions or tainted with illegality or against public policy, as in this case an application for summary judgment and even a default judgment will not be in order notwithstanding the defendant admits the claim. This is so to ensure that the courts are not used as a vehicle by litigants to affirm and give effect to dubious, illegal and/or transactions and dealings which are against public policy. Court is not bound to entertain an application for summary judgment if it takes the view that there ought to be, for some other reasons, a trial of that claim or part. In *Bank Negara*'s case the Supreme Court asserted that:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14.

**[11]** This was a decision before the amendment to RHC 1980. Under the new amendment (PU(A)342/2000) such an application must be made under RHC O 14A and the court should not entertain if it is made under O 14 for obvious reasons relating to finality of the action which if necessary I shall elaborate further at an opportune moment. In this case the plaintiff says that there are no disputed facts and if the only issue is one of law then the application must be made pursuant to O 14A and not O 14.

**[12]** I am satisfied that there are number of triable issues raised by the defendant. Further, I take the view that this is a fit and proper case for which there ought to be a trial to determine the plaintiff's claim. In consequence, I allow the appeal with costs. I also direct the plaintiff to file, Form 63 for case management within seven

days from today and the senior assistant registrar to fix the hearing date for the trial of this action within three months from the date of this decision. I hereby order so. A

*Appeal allowed with costs.*

Reported by Sally Kee B

C

D

E

F

G

H

I